MOTION FILED
OCT 21 1991

No. 91-471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.
GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE OF THE HAZARDOUS WASTE TREATMENT COUNCIL AND THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
DAVID CASE
General Counsel
HAZARDOUS WASTE TREATMENT COUNCIL
1440 New York Avenue, N.W.
Suite 310
Washington, D.C. 20005

BRUCE PARKER
General Counsel
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

STUART H. NEWBERGER
Counsel of Record
RIDGWAY M. HALL, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2649
Attorneys for Hazardous Waste Treatment Council and National Solid Wastes Management Association As Amici Curiae

October 21, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE;
and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE OF THE HAZARDOUS WASTE TREATMENT COUNCIL AND THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Hazardous Waste Treatment Council ("Treatment Council") and the National Solid Wastes Management Association ("NSWMA") move for leave to file the accompanying brief as *amici curiae* in support of the petition

for a writ of certiorari. Counsel for Petitioner Chemical Waste Management, Inc. consented to the filing of this brief; consent of counsel for respondents Governor Hunt *et al.* was requested but refused. The Treatment Council and NSWMA therefore request leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

Of Counsel:
DAVID CASE
General Counsel
HAZARDOUS WASTE TREATMENT COUNCIL
1440 New York Avenue, N.W.
Suite 310
Washington, D.C. 20005

BRUCE PARKER
General Counsel
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

STUART H. NEWBERGER
Counsel of Record
RIDGWAY M. HALL, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2649
Attorneys for Hazardous Waste Treatment Council and National Solid Wastes Management Association As Amici Curiae

October 21, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-471

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE;
and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

BRIEF OF AMICI CURIAE OF THE HAZARDOUS WASTE TREATMENT COUNCIL AND THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The Hazardous Waste Treatment Council ("Treatment Council") is a national not-for-profit trade association having more than 60 member firms with operations in forty-eight states. Its members serve thousands of large and small customers in those states, providing serv-

ices, equipment and technology for the treatment, storage, recycling and disposal of hazardous waste generated by industry and agriculture. The technical services provided by Treatment Council members encompass the full range of hazardous waste management techniques and both established and emerging technologies—including incineration and other thermal destruction, reclamation, biological and chemical treatment, land disposal after pre-treatment, and hazardous site cleanups.[1] As explained below, Treatment Council members depend upon Petitioner's Emelle, Alabama disposal facility in various ways, and are directly affected by the Alabama legislation at issue here. These state laws prevent the efficient use of the Nation's limited resources for waste treatment and disposal by restricting artificially the transportation of such waste at state boundaries. Petitioner Chemical Waste Management, Inc. ("CWM") is not a member of the Treatment Council.

The National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose members are companies engaged in the waste management business. NSWMA consists of over 2,700 members engaged in the entire spectrum of waste management services. Pursuant to its bylaws, NSWMA is charged with protecting the interests of the waste management industry in the public and regulatory arena.[2] In particular, a

---

[1] The Treatment Council's Articles of Incorporation provide that among its purposes is:

> To promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes and the proper management of residues.

[2] The By-Laws of NSWMA direct it to:

> . . . assist governments, public agencies and private organizations in the development, refinement and . . . acceptance of new and approved practices and policies, including laws and regulations in the waste management field . . . .

fundamental goal of NSWMA's advocacy program, as approved by its Board of Directors, is "to ensure adequate waste management capacity in North America."

Members of NSWMA are engaged in the business of transporting and disposing of hazardous waste in Alabama and in other states. Several of NSWMA's members are in the business of transporting hazardous waste into Alabama for disposal within that state. The Alabama legislation at issue here[3] has a direct and adverse impact on the waste transportation, treatment or disposal activities of these members. Petitioner CWM is a member of NSWMA.

REASONS FOR GRANTING THE WRIT

I. THE ALABAMA LEGISLATION AT ISSUE IS SEVERELY DISRUPTING THE NATIONAL MARKETPLACE FOR HAZARDOUS WASTE MANAGEMENT SERVICES AND TECHNOLOGY

The market for the safe treatment and disposal of hazardous waste, as it has developed, is regionally and nationally integrated. For reasons of economy, efficiency and environmental protection, the treatment and disposal of hazardous waste frequently involves crossing state lines. The types of hazardous waste that require treatment and disposal are diverse, as are the technological means of dealing with the waste.[4] It is axiomatic that *no*

---

[3] Ala. Act. No. 90-326 (1990) (codified at Ala. Code § 22-30B-1.1 *et seq.*).

[4] Because of the multitude of hazardous waste produced in our society, no single technology can treat or dispose of *every* type of waste. As a result, the national marketplace in this field necessarily involves the regular shipment of all types of waste across many state borders, to and from customers and facilities located in any states. *See generally National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d 713, 717 (11th Cir. 1990), *modified on other grounds*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 111 S.Ct. 2800 (1991); *see also, Hazardous Waste Treatment Council v.*

state possesses within its borders the means to dispose of *every* type of hazardous waste that even its own residents and industry generate. With respect to the treatment and disposal of hazardous waste, the states—and their businesses and citizens—truly are, and should be, interdependent.[5]

Economies of scale, market forces, geologic and other advantages affect the location and choice of facilities in any state, and the dispersion of facilities and technology among the states. It is far simpler and less costly to move hazardous waste 25 miles *across state lines* to the closest, most technically advanced and safest disposal facility, than it is to move it hundreds of miles *across the same state*. Thus, as this market has developed, hazardous waste frequently is moved across interstate boundaries—just as any other goods or services—to take advantage of the competitive national market in the provision of treatment and disposal services.[6]

South Carolina, 766 F. Supp. 431 (D.S.C.), *aff'd in part, remanded in part*, 1991 U.S. App. LEXIS 22154 (4th Cir. September 20, 1991).

[5] A 1989 study prepared for the U.S. Environmental Protection Agency analyzed waste management "flow" in the South-Central states (which includes Alabama). That comprehensive study demonstated that: (1) no single state in that region has within its borders sufficient "capacity" to treat and dispose of *all* types of hazardous waste; and (2) hazardous waste flows both *out of* and *into* each of those states. *See* Generation and Capacity: A Profile of Hazardous Waste Management in EPA Region IV (February 1989). For example, because Alabama does not have an "aqueous treatment" facility, industry located in that state must arrange for aqueous wastes to be shipped to Tennessee or some other state for proper treatment and disposal. *See National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 717 n.5.

[6] Indeed, data provided by each of the states to the U.S. Environmental Protection Agency, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9604(c)(9) (1988), demonstrates that the national market for the treatment and disposal of hazardous waste is integrated and interdependent because: (1) every state has businesses, agriculture and industry which "generate" a variety of

The existence of this national market meets a very particular national need. Because it is not economically or practically feasible to build treatment and disposal facilities capable of dealing with certain types of waste in *each* state, interstate transportation is unavoidable if waste disposal is to be safe. Moreover, an open national market contributes to the development of innovative technologies and advanced facilities that can best deal with the growing national problem of hazardous waste. That technological development is restrained by the creation of artificial limits on the market which any facility might serve—artificial limitations such as those represented by the closed or restricted borders of any given state.[7] Such limitations thus frustrate Congress' desire to meet the growing national need for the development of safe and advanced treatment and disposal technology and capacity.[8]

The Treatment Council, NSWMA and their members—and the businesses and citizens which they serve—are adversely affected by state efforts to ban or restrict interstate commerce in hazardous waste in various ways.

---

such wastes; (2) EPA has established treatment standards for hundreds of types of hazardous waste and hazardous waste mixtures; (3) there are approximately 19 different treatment technologies available to accommodate the health and safety requirements unique to such wastes; (4) the capital costs for constructing and operating such technologies are high; and (5) as noted above, no single state has within its borders the full range or necessary "capacity" to treat and/or dispose of every type of waste. Thus, businesses and citizens located in almost every single state both export *and* import some hazardous waste for treatment and disposal. *See Interchange of Hazardous Waste Management Services Among States*, Environmental Information, Ltd. (December 1990).

[7] For example, Petitioner's facility at Emelle, Alabama, which is the subject of this case, is one of only two facilities east of the Mississippi River that are permitted (under federal standards) to accept hazardous waste containing PCBs.

[8] *See, e.g.*, 42 U.S.C. § 6902(a) (1988); H.R. Rep. No. 1133, 98th Cong., 2d Sess. 80 (1984); 129 Cong. Rec. H 8896-8897 (daily ed. October 31, 1983).

For example, Treatment Council and NSWMA members located in several states receive materials generated in other states for treatment at their facilities, including materials received at disposal facilities (*i.e.* engineered, secured and permitted landfills) similar to the Emelle, Alabama facility. At the same time, some Treatment Council and NSWMA members do business with, and are customers of, petitioner's Emelle facility. These members treat and destroy hazardous waste (which *they* in turn, receive from out-of-state customers) before transporting the treated waste residue *to* Emelle for disposal. Thus, Treatment Council and NSWMA members depend on the free movement of hazardous waste across state lines (1) *from* their customers *to* their treatment and disposal facilities, and (2) *from* their treatment facilities *to* disposal facilities in other states, including the Emelle facility.[9]

In relying upon the benefits of unrestricted transport and trade within and among the states, Treatment Council and NSWMA members have enjoyed a right that is presumptively granted to all citizens and businesses and

---

[9] The myriad of health and safety requirements under which Treatment Council and NSWMA members operate underscores the need for an integrated national economy in this field. As required by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. § 6924(d)-(m)), and EPA regulatory standards (40 C.F.R. Parts 260-268 (1990)), multiple treatment steps are necessary for waste or waste residue processed at several treatment facilities prior to ultimate land disposal. For example, metal plating waste containing both metals and organic cutting oils might go to a waste treatment facility (in one state) for removal of the oils through phase-separation or oil-water separation. The oils might then go to a solvent recycling facility or to a hazardous waste incinerator (in another state) for removal or destruction of the organic constituents. The inorganic treatment residues either from the recycling or incineration processes are transported to a third site (in another state) for "stabilization" of the metal-bearing residue and, finally, are shipped for ultimate land disposal in a permitted hazardous waste landfill such as Petitioner's Emelle facility.

which lies at the heart of the economic union upon which the domestic economy has long been premised. The issue presented by the instant petition is whether a state may erect barriers at its border to the flow of *this* commerce, as the State of Alabama has done by imposing discriminatory fees on *imported* hazardous waste. Those barriers prevent the efficient use of the Nation's resources.

In a "national economy filled with benefits and burdens," *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *35, Alabama seeks to avail itself of the benefits of the national economy, but divorce itself from the burdens. Alabama enjoys the benefits of open borders between its sister states—shipping and receiving the products of agriculture and industry that *create* the hazardous waste. Alabama nonetheless seeks to "stop the flow" of waste generated by industry and agriculture in *other* states which are sent *to* Alabama for treatment and disposal.

While few states are prepared to renounce the benefit of free interstate trade generally, several states, (such as Alabama and South Carolina), desire that hazardous waste *not* be brought into their state for treatment or disposal. *See Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *32. This phenomenon is known as the "NIMBY" syndrome—"not in my backyard." *Id.* at *8. Although the need for safe and efficient hazardous waste treatment and disposal is widely acknowledged, many citizens would prefer that a treatment and disposal facility not be located nearby.

In the state and local political arena, the pressure to enact legislation keeping hazardous waste from some *other* state out of one's *own* state is virtually irresistible. *See generally, Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *8. The inevitable result of such political pressure is the balkanization of the marketplace in waste treatment and disposal.

That balkanization is inconsistent with the premises of the national economic union in general, and with the special need for the integrated development of the nationwide hazardous waste management industry.

Thus, if the reasoning of the Alabama Supreme Court is correct in upholding the discriminatory laws at issue, then similar restrictions—whether in the form of a restrictive tax or otherwise—will soon be enacted, and must be sustained, in other states as well. The effect of such laws would be, as the Fourth Circuit recently noted, "catastrophic." *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *36. Allowing Alabama to "preserve" available disposal capacity at the Emelle facility solely for the benefit of its own residents thereby shifts the burdens of treating and disposing "imported" waste to other states, which are, in turn, thereby pressured to enact their own laws protecting themselves from the burden of out-of-state waste. Consequently the decision below threatens a far reaching and severe disruption of the entire national marketplace for the treatment and disposal of hazardous waste.

II. THE DECISION OF THE ALABAMA SUPREME COURT REPRESENTS A CLEAR DEPARTURE FROM THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

For nearly 200 years, it has been understood and accepted that the formation of the new national union was premised upon free trade between and among the citizens, businesses and industry of the states of the Union.[10] The primary protection for that trade has been found in

---

[10] The Constitution was founded on the idea that:

> . . . in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), as interpreted by this Court.

The Commerce Clause grants to Congress the power to regulate trade among the citizens of the states. It bars any state from placing its parochial interests above those of the national union by discriminating against and restricting the flow of interstate commerce. The guiding constitutional principle is that no state is permitted to discriminate against or interfere with interstate commerce. *See generally Hughes v. Oklahoma*, 441 U.S. 322; *Maine v. Taylor*, 477 U.S. 131 (1986); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). As a result, state laws that discriminate against interstate commerce are "routinely" held invalid. *New Energy*, 486 U.S. at 274. The standard for justifying discriminatory state laws or activities is extremely high, so high that a virtual *per se* rule of invalidity has been imposed by this Court, particularly with respect to statutes that embody a facial discrimination against interstate commerce. *See New Energy*, 486 U.S. at 278-79, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *see also Hughes v. Oklahoma*, 441 U.S. at 337 (facial discrimination by itself may be a fatal defect).

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court dispelled any doubt whether there exists some implied exception to the principle barring state discriminations against out-of-state goods and services as it relates to the shipment of waste for treatment or disposal. There, New Jersey had sought to restrain the flow of waste entering the state, arguing that (1) the treatment and disposal of waste posed threats to the state's environment and the "limited natural resources" available there for disposal; and (2) the available landfill capacity within its borders was threatened by the treatment and disposal of waste originating both from within the state and from out-of-state sources. Notwithstanding the apparent health

and safety purpose of New Jersey's law, this Court held that:

> [I]t does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may be incidentally affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-27.

Each of the Alabama laws at issue, particularly the $72.00 per ton "additional fee" imposed on waste originating in any other state,[11] represents a form of economic discrimination barred by the Commerce Clause and by this Court's decision in *Philadelphia v. New Jersey*. By applying the $72.00 per ton "additional fee" solely to "imported" waste, Alabama has expressly sought to inhibit the flow of waste for treatment and disposal at the Emelle facility, whose customers are located in dozens of states. Thus, it seeks to use the taxing power as a device to control the flow of commerce between the states, a result precluded by *Philadelphia v. New Jersey*. That Alabama has employed its taxing power to accomplish this goal does not excuse its unconstitutionality.

[11] The $72.00 per ton charge discriminates on its face. The two other statutory restrictions at issue in this case simply mask Alabama's economic discrimination with neutral language. The difficult issues surrounding attempts to pierce such facially neutral impositions on commerce, where their pronounced discriminatory effect makes plain the discriminatory motives underlying such laws, presents an issue that warrants this Court's immediate attention.

See New Energy Co. of Indiana v. Limbach, 486 U.S. 269; *Welton v. Missouri*, 91 U.S. 275 (1875). "[N]o State can, consistently with the Federal Constitution, impose upon the products of other States * * * more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. Baltimore*, 100 U.S. 434, 439 (1879).

No legal justification for Alabama's discrimination can be founded on the character of the waste which crosses its borders. Waste shipped *to* the Emelle facility from outside Alabama—metals, solvents, oil, chemicals, and other waste—is not different from that generated within the state. *See National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 720; *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154, at *21 ("hazardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated" in state).[12]

Alabama's purported concern for the health and safety of its citizens is fully addressed by the extraordinary federal and state regulatory standards and processes which ensure that waste only can be transported for

[12] The Alabama Supreme Court did not take issue with the express finding by the trial court in this case that there was no relevant distinction between waste generated within Alabama and waste generated in other states. As found by the trial court, "hazardous waste generated in Alabama is just as dangerous as that generated in other states" (App. 86a), a holding consistent with the recent Fourth Circuit decision in this area. *See Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 2215, at *35. Moreover, this Court's decision in *Philadelphia v. New Jersey* makes clear that, given the unanimous findings of the lower courts on this issue:

> . . . there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.

437 U.S. at 629.

BEST AVAILABLE COPY

safe treatment and disposal.[13] More to the point, any legitimate concern for health and safety can be satisfied by legislation requiring strict and effective treatment and disposal of any particular form of waste, *provided that such requirements apply evenhandedly* and *do not discriminate*—on their face or in their effect—on the basis of state of origin.

If some implied exception exists from the principles stated by this Court in *Philadelphia v. New Jersey*, the Alabama Supreme Court made no substantial effort to describe it. Indeed, the Alabama Supreme Court attempted to remove the laws at issue from the ambit of established Commerce Clause jurisprudence on the basis of the presumed health and safety objectives of the Alabama legislature. App. 20a. The Alabama Supreme Court thus attempted to reduce the constitutional prohibition on discrimination against interstate commerce to a prohibition on discrimination *motivated* by the desire to provide economic benefits to local industry. App. 19a. It equated this motive with the form of "economic protectionism" prohibited by the Commerce Clause. App. 20a.

Such a distinction ignores the clear holding of this Court in *Philadelphia v. New Jersey*, where the Court struck down the New Jersey law despite the unquestioned public policy objectives of that state in enacting the law. Whatever the "ultimate purpose [of the law], it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-27. The holding in *Philadelphia v. New Jersey* applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." *Maine v. Taylor*, 477 U.S. at 148-49 n.19; *see also New Energy*, 486 U.S. at 279 n.3 (purpose of state law to protect public health will not validate "patent discrimination against interstate commerce"). The "economic protectionism" prohibited by the Commerce Clause thus is not concerned with the state legislature's general motive for acting in a particular field. What must be justified as "non-protectionist" is the *discrimination itself*.[14] Where, as here, the only distinction between the waste is the place of origin, then there is "economic protectionism" of the type that the Commerce Clause forbids—regardless of the motivation of Alabama's Governor and state legislators.

[13] *See Alabama v. United States Envtl. Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), *cert. denied*, 110 S.Ct. 538 (1989) ("The regulations promulgated pursuant to the [Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*] ensure that facilities disposing of hazardous waste do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes").

[14] It is "the *discrimination* [that must be] demonstrably justified by valid factors unrelated to economic protectionism." *New Energy*, 486 U.S. at 274 (emphasis added). This is measured by a dual test. The discriminatory state law must meet a legitimate local purpose *and* the state must show that it cannot adequately serve that local purpose through "reasonable nondiscriminatory alternatives." *Id.* at 278.

III. THIS CASE REPRESENTS A MATTER OF EXCEPTIONAL IMPORTANCE REGARDING THE INTEGRITY OF THE NATIONAL ECONOMIC UNION OF A KIND THAT WARRANTS THIS COURT'S ATTENTION

Beyond the clear departure from this Court's Commerce Clause precedents represented by the decision below, certain additional factors make this case one that warrants issuance of a writ of certiorari.

First, as explained above placing a protectionist tax on its out-of-state customers restricts access to Petitioner's Emelle facility. Given the national scope of the market in hazardous waste management services and the

importance of the Emelle facility to that market, the ripple effects of this case will be felt in many states. Indeed, not only will the interstate flow of hazardous waste be affected and rechannelled, but other states will be forced to somehow manage the waste that Alabama has "rejected"—unless, of course, those states respond by adopting similar exclusionary laws.

Significantly, the citizens of those *other* states do not elect Alabama's Governor or state legislators or state judges, who are most sensitive to the local political forces which place them in office. Thus, it is very difficult for citizens of *other* states to convince Alabama's officials to overturn such discrmiminatory legislation. *See Nippert v. Richmond*, 327 U.S. 416, 434-35 (1946). Their only recourse is to convince their own state legislatures to adopt similar exclusionary laws. The immediate result is the balkanization of the national economic union. Thus, this is the type of case in which this Court's authority and duty to intercede is at its highest—to prevent a retaliatory, economic war between the states.

Second, the decision of the Alabama Supreme Court is in clear conflict with the decisions of several federal and other state courts.[15] Indeed, given the decision of the Eleventh Circuit in *National Solid Wastes Mgt. Ass'n v.*

---

[15] *See National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d 713 (rejecting prior Alabama attempt to ban imports of hazardous waste from certain states); *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 (South Carolina laws enjoined where they ban, restrict or impose quotas on the import of hazardous waste); *National Solid Wastes Mg't Ass'n v. Voinovich*, 763 F.Supp. 244 (S.D. Ohio 1991), *appeal pending*, No. 91-3466 (6th Cir.) (Ohio fee on imported waste declared unlawful); *see also Illinois v. General Electric Co.*, 683 F.2d 206, 213-14 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *American Trucking Ass'n v. Sec't'y of State*, 1991 Me. LEXIS 148 (Me. June 17, 1991).

Alabama Dep't of Envtl. Mgt., 910 F.2d 713, this conflict is particularly unseemly because there now exist *two* Commerce Clause standards *within* Alabama: discriminatory *non-tax* measures affecting imported hazardous waste are invalid (because they are subject to challenge in federal court); while discriminatory state *tax* measures regarding the same imported waste will be upheld because, under the strictures of the Tax Injunction Act, 28 U.S.C. § 1341, their constitutionality under the Commerce Clause may be challenged only in Alabama state court. Unfortunately, the same device—structuring a state's discrimination against the flow of waste in the form of a prohibitory tax, thus attempting to avoid federal court review—is available to every state legislature.

Third, as noted above, the issue presented by this case reflects a recurring nationwide concern. The NIMBY ("not in my backyard") syndrome associated with the treatment and disposal of hazardous waste is pervasive. Declarations by state officials that they will not allow their home state to become a "dumping ground" for the hazardous waste of other states reflect a politically expedient course. And the local pressure on state governors and legislators to enact laws that limit the flow of waste into their state is intensified when *other* states have enacted similar laws. There is direct pressure to retaliate against states that will not accept the imports of waste. Indeed, such direct retaliation—designed to force other states to change their policies—was evident in Alabama's earlier blacklisting of certain states (which Alabama felt were not living up to their responsibilities), *see National Solid Wastes Mgt. Ass'n v. Alabama Dep't of Envtl. Mgt.*, 910 F.2d at 718, and in South Carolina's similar efforts to restrict the import of waste from North Carolina and other states. *See, Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 at *17. The issue presented by this case thus is of widespread and immediate concern to many state legislatures

as well as industry. Those state legislatures that have refrained from enacting such laws in the past have presumably done so out of respect for clear constitutional principles. If Alabama is free to enact such discriminatory laws, then other states will not be restrained.

Fourth, the decision of the Alabama Supreme Court poses a very real health and safety threat. As the Fourth Circuit recently held, the efforts of various states to limit or bar out-of-state waste—reducing the available capacity to safely and effectively manage the waste—could cause some industries and citizens to return to the days of dumping waste illegally. *Hazardous Waste Treatment Council v. South Carolina*, 1991 U.S. App. LEXIS 22154 at *21. As such, *more* "Superfund" dumping sites may arise if permitted and regulated disposal capacity is removed from the national marketplace, thereby frustrating the health and safety goals of the federal regulatory scheme. *Id.* at *9.

The Treatment Council, NSWMA and their members are of the view that *all* discriminatory restrictions on the flow of this article of commerce are invalid. To allow any state to embargo or handicap the flow of commerce in this field would interfere with the development of technology that is essential to serve the Nation's industrial and agricultural base. The need for rapid development of technology and expansion of treatment and disposal capacity—recognized by Congress as vital to meeting national requirements for the disposal of hazardous waste—would not be well-served by an extended retaliatory war between the states over the shipment of waste. Neither would that interest be well-served by even a brief period of parochially-sponsored, state-imposed embargoes on the transportation of waste for safe treatment and disposal. Therefore, this is an appropriate case for the Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:
DAVID CASE
General Counsel
HAZARDOUS WASTE TREATMENT COUNCIL
1440 New York Avenue, N.W.
Suite 310
Washington, D.C. 20005

BRUCE PARKER
General Counsel
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

STUART H. NEWBERGER
Counsel of Record
RIDGWAY M. HALL, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2649

Attorneys for Hazardous Waste Treatment Council and National Solid Wastes Management Association As Amici Curiae

October 21, 1991